

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-2649 CW

HABEAS CORPUS RESOURCE CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE  
and MICHAEL B. MUKASEY, in his  
official capacity as Attorney General  
of the United States,

Defendants.

ORDER GRANTING IN  
PART DEFENDANTS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON  
EXEMPTIONS

Defendants U.S. Department of Justice (DOJ) and Michael Mukasey move for partial summary judgment on the issue of the propriety of their withholding certain documents in response to Plaintiff Habeas Corpus Resource Center's Freedom of Information Act (FOIA) request. The request sought documents related to the DOJ's development of a proposed regulation detailing the certification process for state capital counsel systems. In particular, the request focused on communications between the DOJ and outside groups and individuals. Plaintiff is concerned that certain interests may have been permitted to exercise undue influence over the development of the regulation. The Court has

1 reviewed in camera the withheld documents and has determined that  
2 they were properly withheld from disclosure except as noted herein.

### 3 LEGAL FRAMEWORK

4 FOIA entitles private citizens to access government records.  
5 "The Supreme Court has interpreted [FOIA's] disclosure provisions  
6 broadly, noting that the act was animated by a 'philosophy of full  
7 agency disclosure.'" Lion Raisins v. U.S. Dep't of Agric., 354  
8 F.3d 1072, 1079 (9th Cir. 2004) (quoting John Doe Agency v. John  
9 Doe Corp., 493 U.S. 146, 152 (1989)). However, FOIA exempts nine  
10 categories of government documents from disclosure. See 5 U.S.C.  
11 § 552(b)(1)-(9). "Unlike the disclosure provisions of FOIA, its  
12 statutory exemptions 'must be narrowly construed.'" Lion Raisins,  
13 354 F.3d at 1079, (quoting John Doe Agency, 493 U.S. at 152). The  
14 Court reviews the government's withholding of agency records de  
15 novo, and the government bears the burden of justifying its non-  
16 disclosure. 5 U.S.C. § 552(a)(4)(B).

### 17 DISCUSSION

#### 18 I. Exemption 5

19 The bulk of the documents at issue were withheld pursuant to  
20 FOIA Exemption 5. Under this exemption, the government can refuse  
21 to disclose "inter-agency or intra-agency memorandums or letters  
22 which would not be available by law to a party other than an agency  
23 in litigation with the agency." 5 U.S.C. § 552(b)(5). "This  
24 provision shields 'those documents, and only those documents,  
25 normally privileged in the civil discovery context.'" Carter v.  
26 U.S. Dep't of Commerce, 307 F.3d 1084, 1088-89 (9th Cir. 2002)  
27 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)).  
28 Exemption 5 incorporates the executive "deliberative process"

1 privilege, the purpose of which is "'to prevent injury to the  
2 quality of agency decisions' by ensuring that the 'frank discussion  
3 of legal or policy matters' in writing, within the agency, is not  
4 inhibited by public disclosure." Maricopa Audobon Soc'y v. U.S.  
5 Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting Sears,  
6 421 U.S. at 150-51.)

7 To qualify for the deliberative process privilege, a document  
8 must be both "predecisional" and "deliberative." Carter, 307 F.3d  
9 at 1089. "A 'predecisional' document is one prepared in order to  
10 assist an agency decisionmaker in arriving at his decision, and may  
11 include recommendations, draft documents, proposals, suggestions,  
12 and other subjective documents which reflect the personal opinions  
13 of the writer rather than the policy of the agency." Assembly of  
14 the State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th  
15 Cir. 1992) (citations and internal quotation marks omitted). In  
16 this case, the relevant decision was that of the DOJ to propose  
17 promulgating the version of the certification regulation that was  
18 published in the Federal Register. A document is "deliberative" if  
19 its disclosure "would expose an agency's decisionmaking process in  
20 such a way as to discourage candid discussion within the agency and  
21 thereby undermine the agency's ability to perform its functions."  
22 Id. (quoting Dudman Commc'ns Corp. v. Dep't of the Air Force, 815  
23 F.2d 1565, 1568 (D.C. Cir. 1987)). The deliberative process  
24 privilege "does not protect a document which is merely peripheral  
25 to actual policy formation; the record must bear on the formulation  
26 or exercise of policy-oriented judgment." Tigue v. U.S. Dep't of  
27 Justice, 312 F.3d 70, 80 (2d Cir. 2002) (quoting Ethyl Corp. v.  
28 EPA, 25 F.3d 1241, 1248 (4th Cir. 1994)). Although the

1 predecisional and deliberative requirements are distinct, "they  
2 tend to overlap in practice." Carter, 307 F.3d at 1089.

3 Having reviewed the withheld documents, the Court concludes  
4 that, contrary to Defendants' assertion, the following documents or  
5 portions thereof are not protected by the deliberative process  
6 privilege:

7 (1) Document No. 4<sup>1</sup>: This document summarizes issues raised  
8 by outside groups. It does not reflect deliberations  
9 within the DOJ and does not contain the opinions of the  
10 author.<sup>2</sup> It must be disclosed in its entirety. See  
11 Dep't of the Interior v. Klamath Water Users Protective  
12 Ass'n, 532 U.S. 1, 12 (2002) (communications between an  
13 agency and individuals "communicating with the Government  
14 in their own interest or on behalf of any person or group  
15 whose interests might be affected by the Government  
16 action" are not protected by the deliberative process  
17 privilege).

18 (2) Document No. 8: The third sentence in the body of the  
19 cover email is not deliberative in that it is peripheral

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21 <sup>1</sup>The document numbers listed here refer to the entries on  
Defendants' main Vaughn index (Docket No. 36).

22 <sup>2</sup>The single-page document that was submitted for in camera  
23 review appears to be incomplete. The bottom of the page lists  
participants in a meeting between the DOJ and the National  
24 Association of Attorneys General, but the document does not go on  
list the issues that were raised at that meeting. In contrast, the  
25 previous part of the document lists the participants and then the  
issues that were discussed at a meeting with the American Bar  
26 Association. Defendants must determine whether the original  
document consists of more than one page, and shall produce the  
27 entire document to Plaintiff unless they believe the additional  
pages contain information that, consistent with the Court's  
28 determination with respect to the first page, is exempt, in which  
case they must submit the document for in camera review.

1 to and does not bear on substantive policy development.  
2 The cover email must be disclosed, although Defendants  
3 may redact the first two sentences of the email if they  
4 wish. The attachment may be withheld.

5 (3) Document No. 9: The first paragraph of the email  
6 discusses communications between the DOJ and Senator  
7 Kyl's office. It is not privileged. The second and  
8 third paragraphs of the email contain a proposed response  
9 to an undisclosed question from a member of the news  
10 media.<sup>3</sup> This portion of the document is not  
11 predecisional or deliberative because it was not prepared  
12 to assist an agency decision-maker in arriving at a  
13 substantive policy decision and does not bear on the  
14 formation of any such decision. The email must therefore  
15 be disclosed in its entirety.

16 (4) Document No. 29: The last sentence of the first paragraph  
17 of the body of the email refers to communication from  
18 individuals outside the DOJ and thus is not privileged.  
19 The email must be disclosed, but Defendants may redact  
20 the remainder of the body of the email as well as the  
21 author's mobile phone number.

22 (5) Document No. 35-1: The withheld paragraph does not  
23 discuss substantive policy and is peripheral to the DOJ's  
24 decision. It must be disclosed.

25 (6) Document No. 35-9: The last two paragraphs of the

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26  
27 <sup>3</sup>Defendants shall review the email to which Document No. 9 is  
28 a response and ensure that it is in fact not responsive to  
Plaintiff's FOIA request. If it is responsive, it must be  
disclosed.

document discuss proposed communications with Senator Kyl's office. They do not reflect the author's view on substantive policy and must be disclosed. The redacted email from Ryan Bounds also concerns this communication. Although it contains a minimal amount of information regarding the status of the regulation, it is not deliberative in nature and disclosure of this information would not expose the DOJ's decisionmaking process in such a way as to discourage candid discussion within the agency. In addition, according to the email string, this information was communicated to Senator Kyl's office. It must be disclosed. Defendants may continue to withhold the redacted portion of the first paragraph of David Kemp's email.

- (7) Document Nos. 35-11, 35-12, 36-2, 36-3 and 36-4: The withheld portions of these documents discuss proposed communications with outside interests. They are peripheral to the formation of substantive policy and must be disclosed.

A number of additional withheld documents refer to revisions to the draft regulation that were made as a result of review by the Office of Management and Budget (OMB). Plaintiff points out that Executive Order 12,866 provides:

After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

. . .

- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action

1 subsequently announced; and

2 (iii) Identify for the public those changes in the  
3 regulatory action that were made at the suggestion or  
recommendation of OIRA.

4 Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993),  
5 § 6(a)(3)(E). Some of the withheld documents reflect the revision  
6 process after OMB review, and Plaintiff contends that this material  
7 must be disclosed. However, the executive order on its face  
8 requires only that an agency summarize the changes that were  
9 ultimately made to a regulation as a result of OMB/OIRA review; it  
10 does not purport to require disclosure of all documents reflecting  
11 the deliberative process that led to such changes. In addition, as  
12 Defendants note, the executive order also provides:

13 Nothing in this Executive order shall affect any  
14 otherwise available judicial review of agency action.  
15 This Executive order is intended only to improve the  
16 internal management of the Federal Government and does  
17 not create any right or benefit, substantive or  
procedural, enforceable at law or equity by a party  
against the United States, its agencies or  
instrumentalities, its officers or employees, or any  
other person.

18 Id. § 10. Therefore, the Court may not order disclosure of  
19 documents that are subject to the deliberative process privilege on  
20 the basis that Executive Order 12,866 carves out an exception to  
21 the privilege.

22 Plaintiff also argues that documents "reflecting information  
23 that formed the basis of the regulations as proposed -- and thus  
24 reflect the policy of the agency -- [] do not come within the  
25 deliberative process privilege." Pl.'s Opp. at 7. This is a  
26 sweeping proposition that would potentially require the disclosure  
27 of many documents that are both predecisional and deliberative.  
28 But it is not an accurate description of the law, and the cases

1 Plaintiff cites are not on point. For example, Assembly of the  
2 State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916 (9th Cir.  
3 1992), the primary case on which Plaintiff relies, simply holds,  
4 "Material which predates a decision chronologically, but did not  
5 contribute to that decision, is not predecisional in any meaningful  
6 sense." Id. at 921. Similarly, Sears, 421 U.S. 132, holds that  
7 intra-agency communication that explains a policy already adopted  
8 becomes the "working law" of the agency. As such, it is not pre-  
9 decisional and is not protected by the deliberative process  
10 privilege. Id. at 152. These cases do not apply to the material  
11 Defendants have withheld.

12 Plaintiff also argues that Defendants may not invoke Exemption  
13 5 because the withheld records may shed light on government  
14 misconduct. This argument is based on the premise that the  
15 privilege is a qualified one that can be overcome under certain  
16 circumstances -- in particular, where documents to which the  
17 privilege applies are sought during civil discovery and are central  
18 to a plaintiff's claim of government misconduct. See, e.g., North  
19 Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D.  
20 Cal. 2003). However, whether particular documents may  
21 theoretically be subject to discovery in a particular civil action  
22 is irrelevant to whether they are exempt from disclosure under FOIA  
23 Exemption 5. The "test under Exemption 5 is whether the documents  
24 would be 'routinely' or 'normally' disclosed upon a showing of  
25 relevance." FTC v. Grolier Inc., 462 U.S. 19, 26 (1983). "It  
26 makes little difference whether a privilege is absolute or  
27 qualified in determining how it translates into a discrete category  
28 of documents that Congress intended to exempt from disclosure under



1 Exemption 5. Whether its immunity from discovery is absolute or  
2 qualified, a protected document cannot be said to be subject to  
3 'routine' disclosure." Id. at 27. In addition, case law  
4 addressing the circumstances under which the deliberative process  
5 privilege may be overcome in non-FOIA litigation cannot be applied  
6 here. Unlike in the context of a civil discovery dispute, in this  
7 case it is inapposite to ask whether the withheld documents are so  
8 central to Plaintiff's claim that the privilege may not be invoked.  
9 Here, production of documents is the beginning and the end of  
10 Plaintiff's claim. In any event, the Court has reviewed the  
11 withheld documents, and none of them would be central to any  
12 hypothetical future claim based on the government misconduct that  
13 Plaintiff alleges.

14 II. Exemption 6

15 FOIA Exemption 6 applies to "personnel and medical files and  
16 similar files the disclosure of which would constitute a clearly  
17 unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).  
18 To determine whether an invasion of privacy is clearly unwarranted,  
19 courts must balance four factors: "(1) the plaintiff's interest in  
20 disclosure; (2) the public interest in disclosure; (3) the degree  
21 of the invasion of personal privacy; and (4) the availability of  
22 any alternative means of obtaining the requested information."  
23 Multnomah County Medical Soc. v. Scott, 825 F.2d 1410, 1413 (9th  
24 Cir. 1987).

25 Plaintiff maintains that the DOJ's decision to hire Jennifer  
26 Goldstein, an attorney who played a key role in developing the  
27 certification regulation, was politically motivated. Plaintiff's  
28 FOIA request sought information concerning Ms. Goldstein's hiring

1 in order to determine whether the regulation's development may have  
2 been tainted by bias. Defendants have withheld two documents --  
3 Nos. 36-1 and 36-5 on the Vaughn index -- that contain email chains  
4 regarding the decision to hire Ms. Goldstein. Although these  
5 documents contain professional opinions about Ms. Goldstein, the  
6 authors had little to say and the emails contain no personal  
7 information. Plaintiff's interest -- and the public's interest  
8 -- in determining whether Ms. Goldstein's hiring was improper is  
9 sufficient to outweigh any minimal privacy interest Ms. Goldstein  
10 may have in keeping these opinions from the public. Accordingly,  
11 these documents must be disclosed. However, Defendants may redact  
12 the mobile telephone number of Ryan Bounds, which appears on each  
13 document.

## 14 CONCLUSION

15 For the foregoing reasons, Defendants' motion for summary  
16 judgment is granted in part and denied in part. Defendants must  
17 forthwith disclose the documents or portions thereof as discussed  
18 herein.

19 IT IS SO ORDERED.

20  
21 Dated: 11/21/08



22 CLAUDIA WILKEN  
23 United States District Judge  
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